

STATE OF MICHIGAN
COURT OF APPEALS

KEITH WINELAND,

Plaintiff-Appellant,

v

GIORA ADAM, M.D.,

Defendant-Appellee.

UNPUBLISHED

January 31, 2003

No. 234607

Ingham Circuit Court

LC No. 00-092725-NH

Before: Neff, P.J., and Hoekstra and O’Connell, JJ.

NEFF, P.J. (*dissenting*).

I respectfully dissent. The notarization deficiency in the affidavit of merit filed with the complaint is unrelated to the substantive affirmations of the affidavit, and the technical deficiency was subsequently cured. I would conclude that the requirement of MCL 600.2912d, that an affidavit of merit be filed with the complaint, is met.

MCL 600.2912d requires that an affidavit of merit be filed with the complaint to commence a medical malpractice action:

(1) Subject to subsection (2),^[1] the plaintiff in an action alleging medical malpractice or ... the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. ...

“The purpose of MCL 600.2912d is to deter frivolous medical malpractice claims.” *Young v Sellers*, ___ Mich App ___, ___ NW2d ___ (Docket No. 239829, issued December 20, 2002), slip op p 3. This purpose is not furthered by rejecting what is, in substance, a valid affirmation of the merits of the claim, in favor of formalities.

In this case, the affidavit of merit was properly filed with plaintiff’s complaint, but lacked a notarization. This technical deficiency was later cured. The affirmations and the affiant were unchanged. The cured affidavit was thus in substance the same affidavit as the initial affidavit

¹ Subsection (2), providing for an extension of the time requirements, is not at issue in this case.

filed with the complaint. The deficiency in the affidavit was curable and was so cured. Under these circumstances, the filing of the affidavit of merit comports with the statutory requirements.

The majority relies on this Court's analysis in *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 620 NW2d 319 (2000), in concluding that summary dismissal of plaintiff's case is mandated. I find *Holmes* distinguishable on the facts. The plaintiff in *Holmes* failed to file an affidavit of merit with his complaint, and subsequently filed an unsworn affidavit; his case was dismissed without prejudice, and he filed a second complaint, apparently again without an affidavit of merit. *Id.* at 710. Sometime later, apparently after the expiration of the limitation period, the plaintiff filed an affidavit of merit. The plaintiff's case was again dismissed without prejudice. After the expiration of the limitation period, the plaintiff filed a third complaint, apparently accompanied by a notarized affidavit. *Id.* The *Holmes* Court found that the plaintiff failed to file a proper affidavit as required by MCL 600.2912d before the limitation period expired. *Holmes, supra* at 711-712. In this case, plaintiff did not fail to file the affidavit with his complaint and although it was not notarized, the initial affidavit was later notarized.

Further, unlike in *Holmes*, where there was no indication that the doctor confirmed the document's contents by oath or affirmation, *id.* at 712, here, along with the cured affidavit of merit, plaintiff provided a third affidavit of the affiant doctor, stating that at the time he signed the initial affidavit he "swore and deposed the contents of the affidavit, affirming the facts contained in the affidavit." Further, he had made the statements in the initial affidavit voluntarily, and that his "signature on the affidavit confirmed [his] oath and affirmation of the facts stated in the affidavit."

Even if *Holmes* were not considered factually distinguishable from the instant case, under existing Supreme Court precedent, it is my view that *Holmes* should not be extended beyond the specific facts of that case, where the plaintiff failed to file an initial affidavit of merit with the complaint and failed to properly cure the deficiency in the first instance. See *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998), *aff'd* 461 Mich 547; 607 NW2d 711 (2000). As the *Holmes* Court recognized, the Michigan Supreme Court noted in *Scarsella* that the strict rules concerning the filing of an affidavit of merit under MCL 600.2912d do not necessarily extend to situations in which an affidavit of merit was filed and subsequently found to be inadequate or defective. *Scarsella, supra*, 461 Mich 553; *Holmes, supra* at 712 n 4. This case presents such an instance. The affidavit of merit was filed with the complaint and was later found to be deficient. The deficiency was unrelated to the substantive merits of the case and was cured. The trial court acknowledged that the affidavit substantially complied with the statute, but was technically deficient.

In my view, summary dismissal of this case is based on an overly technical reading of the statutory requirements. The result is an overwhelming and ubiquitous rejection of medical malpractice claims by the courts on technicalities, regardless of the circumstances and substantive merits of the action. See *Young, supra* at slip op 3-4. While MCL 600.2912d undoubtedly serves a valid and worthy purpose, our adherence to an overly technical and stringent application of its requirements is not in keeping with the spirit or intent of tort reform.

/s/ Janet T. Neff